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In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

DONALD L. COOKS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–9A) is reported at 493 F. 2d 668. The opinion of the district court (App. B, *infra*, pp. 10A–13A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1974 (App. C, *infra*, p. 14A). A timely petition for rehearing *en banc* was denied on July 25, 1974 (App. D, *infra*, p. 15A). By order of August 16, 1974, Mr. Justice Marshall extended the time for fil-

ing a petition for a writ of certiorari to and including September 23, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an entry by law enforcement agents into a dwelling, with the consent of the occupants, is rendered impermissible because, at or before the time of entry, the agents may have entertained the subjective intention to make a prohibited search or arrest.

2. Whether law enforcement agents, once lawfully within a dwelling and upon discovering the occupants armed and apparently dangerous, may quickly examine other rooms to guard against the possibility that persons in those rooms may endanger the safety of the agent, or prevent them from effecting an arrest.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. At 11:30 a.m. on January 31, 1973, Detective Lester Anderson of East St. Louis, Illinois, then working for the Drug Abuse Law Enforcement (DALE) agency of the federal government, began at the suggestion of his superior a surveillance of the

duplex residence at 741 North 31st Street, East St. Louis. His office had received several complaints from neighbors, from which it was inferred that there was a possibility that the residence was being used as a base for drug sales. At the time the surveillance was instituted the officers had no information other than the citizen complaints.[1] (Tr. 12).[2] Early in the afternoon, Detective Anderson and another agent stopped a car shortly after it had left the observed residence; nothing was found during a brief pat-down of the car's occupants, and they were not detained (Tr. 14–19).

The surveillance continued and the agents' suspicions were reinforced as a large number of persons continued to enter the residence, stay for a brief time, and depart. Arrangements were made for additional agents to join the vigil. At about 9:00 p.m. the agents stopped another car as it was leaving the house. As the occupants got out of the car at the request of the agents, one agent observed a small envelope of the type often used to hold marijuana (Tr. 28–44). The envelope was opened, revealing a vegetable substance that appeared to be marijuana. The occupants of the car disclosed that they had purchased the drug at the

[1] The statement of facts is taken from the transcript of the suppression hearing, supplemented by those facts recited in the opinions of the district and circuit courts. Three law enforcement agents testified at the hearing; there is no conflict in their testimony, and no questions were raised there concerning their credibility. Neither respondent nor any other occupant of the residence testified.

[2] "Tr." refers to the transcript of the suppression hearing held on March 22 and 23, 1973.

residence the agents were watching. They were not detained further.

Detective Anderson decided to return to the residence to make a "buy and bust" (Tr. 59). Under this procedure, agents would approach the occupants and attempt to purchase some marijuana (Tr. 55);[3] as soon as the purchase had been completed, arrests would be made (Tr. 59). Detective Anderson, who was dressed in casual clothes, began to approach the house. The door was open, attended by a man later identified as Calvin Cooks, respondent's brother. Calvin Cooks closed the door and observed Detective Anderson through a window as Anderson approached. After Anderson had come closer, however, Calvin Cooks reopened the door and said "Come on in, man." (Tr. 56).[4] Detective Anderson was not yet close enough to ring the bell or knock (Tr. 50).

Upon entering, Anderson observed that Calvin Cooks was wearing a shoulder holster with a gun; another man, Willie Smith, was sitting behind the door wearing an empty shoulder holster, with his right hand out of sight (Tr. 58). Smith apparently recognized Detective Anderson and began to raise a pistol (Tr. 59). Anderson, in order to protect himself, immediately announced "Police," showed his badge, and wrested the gun from Smith (*ibid.*). At the time of these events three other men, not observably armed,

[3] Detective Anderson's testimony was corroborated by that of Special Agent Kenneth R. Bloemker of the Bureau of Narcotics and Dangerous Drugs (Tr. 68–69).

[4] This testimony was corroborated by Detective James L. Walker (Tr. 77).

were seen sitting on a couch on the other side of the living room.

Other agents entered the front door of the house when they heard Anderson identify himself and scuffle with an occupant. One of these agents, Detective James L. Walker of the East St. Louis police, quickly proceeded through the other three rooms of the residence in order to "secure the building" (Tr. 79). In the first room Walker found an apparently unconscious man; he did not investigate further. In the second room he observed piles of debris; again he did not tarry to search them. He then came to the kitchen, at the rear of the duplex, where he discovered respondent sitting at the table, apparently preparing marijuana for sale. A .32 caliber revolver was resting on the table (Tr. 81). Detective Walker seized the revolver and admitted other agents through the back door. The marijuana, which was in open view on the kitchen table, formed the basis for the criminal charge against respondent.

2. Respondent sought to suppress the marijuana found during Detective Walker's protective sweep of the building. The district court ruled from the bench, after hearing the testimony of Detectives Anderson and Walker, and Agent Bloemker, that suppression was required "because there was not a search warrant, and it appears from the overall circumstances that there was probable cause for a warrant, but one was not obtained * * *" (Tr. 83). It later issued a memorandum opinion to the same effect (App. B, *infra*, pp. 10A–13A).

3. The court of appeals dismissed the government's argument that the consented-to entry for the purpose of making a "buy and bust" was an exception to the warrant requirement, because:

> [t]he present factual situation, however, somewhat belies the contention that the purpose was only to purchase evidence of a crime and not to arrest and search the persons and premises involved herein. [App. A, *infra*, p. 5A.]

The court concluded that, in light of this motive (found *de novo* by the panel), the agents could not enter without a warrant, even with the consent of the occupants.

The court of appeals went on to rule that, even assuming *arguendo* that the agents were properly within the residence, the seizure of the marijuana was impermissible. It rejected the government's argument that the agents were entitled to make a "protective sweep" in order to guard against possible danger to themselves. The court found it "readily apparent" (App. A, *infra*, p. 8A) that the protective sweep was not limited to the immediate area of the arrestee and was, therefore, under the court's interpretation of *Chimel* v. *California*, 395 U.S. 752, "well without" any permissible scope.

REASONS FOR GRANTING THE WRIT

1. With respect to the legality of the initial entry, the decision below conflicts with that of the Tenth Circuit in *United States* v. *Welsch*, 446 F. 2d 220, in which a search was approved after agents, who "knocked on the door and were prepared to force it

open" (*id.* at 221), were admitted by consent. The decision also appears to be at odds with *Sirimarco* v. *United States*, 315 F. 2d 699 (C.A. 10), certiorari denied, 374 U.S. 807, and *United States* v. *Lee*, 308 F. 2d 715 (C.A. 4), both of which approve of searches objectively lawful when made, in spite of the agents' desire to act unlawfully, or their belief that they were so acting.

The court below made a finding that the occupants' consent did not justify the agents' entry, because the agents had an improper "purpose." The court's finding concerning purpose, intent or motivation can be read in several ways. It might be a finding that the agents intended to arrest the occupants and search the premises immediately upon making a purchase. However, because this would place the court in conflict with *Lewis* v. *United States*, 385 U.S. 206, which approved the "buy and bust" without a warrant, and with *United States* v. *Glassel*, 488 F. 2d 143 (C.A. 9), certiorari denied, No. 73–5777, April 15, 1974, which held that the "bust" could follow immediately upon the "buy," we do not believe that the court intended this implication.[5] Accordingly, the court must have

[5] This reading would also place the decision below in conflict with *Hoffa* v. *United States*, 385 U.S. 293, which recognized that a governmental investigation could lawfully proceed without a warrant, even though there was probable cause to obtain one. Such a continuing investigation often includes consent entries. See, *e.g.*, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 228. Moreover, we do not believe that the court of appeals intended to hamper the use of the buy and bust, which is a relatively unintrusive law enforcement technique, compare *Lewis*, *supra*, with *United States* v. *Russell*, 411 U.S. 423. Cf. Packer, *The Limits of the Criminal Sanction* 194–201, 284–286 (1968). Officers engaged in a buy and bust will of necessity have the

meant that the agents either (a) intended to enter the residence whether or not consent was given, or (b) if consent to enter were given, intended to arrest[6] whether or not they were able to purchase drugs. We do not distinguish further between these two possible findings, for they raise identical problems for evaluation of police conduct and resolution of the two issues raised in this petition.

The court of appeals has given to motivation and purpose an unwarranted importance in the evaluation of searches and seizures. Although the role of motivation in assessing the legality of police conduct is unsettled,[7] we submit that the reasonableness of a search should be judged by the surrounding circumstances and not by surmises about the thoughts of the officers who conduct it. The question is, in any event, an important one.

At least one court of appeals, *Massachusetts* v. *Painten*, 368 F.2d 142 (C.A. 1), certiorari dismissed as improvidently granted, 389 U.S. 560, joined now by the court below, is of the opinion that when agents intend to make an unconstitutional search if they fail

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subjective desire to arrest if they can gather sufficient evidence through this technique, and it is thus implicit in *Lewis* that this (entirely proper) motive does not taint the entry.

[6] A suppressed assumption in the court of appeals' ruling is that an entry without a warrant for the purpose of making a probable cause arrest is unconstitutional. This is a question that remains unsettled, see *Coolidge* v. *New Hampshire*, 403 U.S. 443. However, it is unnecessary to resolve that issue here, because the court of appeals was incorrect even assuming that the agents intended to do an unconstitutional deed. Accordingly, we do not present that difficult issue in this petition.

[7] See Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 372–373 (1974).

to make a constitutional one, the resulting search, even though it meets all objective criteria of validity, cannot be allowed. It is possible to read dicta in *Jones* v. *United States,* 357 U.S. 493, 500,[8] and *Sibron* v. *New York,* 392 U.S. 40, 64,[9] to support the same proposition.

On the other hand, at least two circuits have agreed that:

> a[n objectively] lawful search, though not made under subjective claim or knowledge of right, remains lawful and evidence so obtained is admissible.

Sirimarco v. *United States, supra,* 315 F. 2d at 702. See also *United States* v. *Welsch, supra; United States* v. *Lee, supra.* Similarly, last term this Court, in *United States* v. *Robinson,* 414 U.S. 218, upheld the search of an arrestee despite the claim that the motive and purpose for the search exceeded the justification that supported it.[10]

As a rule, the motive or purpose of the law enforcement agents should not control the legality of their

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[8] Where the record makes it "clear beyond dispute that [the agents'] purpose in entering was to search for distilling equipment, and not to arrest petitioner," the entry is unconstitutional and the distilling equipment found in plain view must be suppressed, even assuming *arguendo* that it would have been permissible to enter for the purpose of making an arrest.

[9] The officer's statement "made it abundantly clear that he sought narcotics," and the search was therefore impermissible, although there would have been more (although perhaps not enough) justification for the search had he sought weapons.

[10] Amsterdam, *supra,* states that the *Robinson* decision supports the proposition that post-arrest motive is irrelevant, while reserving the question whether an improperly motivated "pretextual" arrest, even with probable cause to arrest, is permissible. 58 Minn. L. Rev. at 373.

acts. The Fourth Amendment is directed to the prevention of unconstitutional searches, not to the suppression of improper desires.

> The position of the courts below must rest on a view that a policeman's intention to offend the Constitution if he can achieve his goal in no other way contaminates all of his later behavior. * * * That such a rule makes no sense is apparent * * * [S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.

Massachusetts v. *Painten, supra,* 389 U.S. at 564–565 (White, J., with whom Harlan and Stewart, JJ. joined, dissenting from the dismissal of certiorari).

It is not necessary, however, for the Court to essay a general resolution of the problem of motivation and purpose in order to find that the court below erred. Whatever role motive may play in other corners of Fourth Amendment law, it is irrelevant to searches and seizures predicated on consent. The basis for upholding the consent search is not found in an examination of its reasonableness, or of the information possessed by the agent at the time he conducts the search, or in any other presearch activity. Instead, the justification to proceed is found solely in the consent itself, which permits a search without reference to extrinsic events. Cf. *Schneckloth* v. *Bustamonte,* 412 U.S. 218; *United States* v. *Matlock,* 415 U.S. 164. It was improper for the court of appeals to examine anything other than the events involved in obtaining the consent

to enter; if that consent was voluntarily given within the meaning of *Schneckloth*, then the search should be permitted."[11]

The decision below conflicts with *Welsch*, *Lee* and *Sirimarco*, and is contrary to sound policy. Certiorari is appropriate to resolve the conflict and provide guidance in this important area of the law.

2. The second question presented in this petition may be even more important for the sound administration of the criminal justice system. The court below held that the agents, even assuming that they were properly within the dwelling, were forbidden to conduct a "protective sweep" to secure themselves against potential danger from other armed but unobserved occupants of the dwelling. The ruling below conflicts with contrary decisions in several circuits.[12]

In *Terry* v. *Ohio*, 392 U.S. 1, this Court ruled that police could, when lawfully in the presence of one who

[11] The result reached here by the court of appeals seems to us to invert the correct law enforcement priorities. Entry into a house under authority of a warrant involves actual use of force or reliance on a demand supported by the lawful right to resort to force under the authority of the warrant. A consent entry entails neither force nor threat, and the giving of consent to enter necessarily removes any need for the warrant authorizing forcible entry.

[12] See *United States* v. *Blake*, 484 F. 2d 50 (C.A. 8), certiorari denied, No. 73-6419, June 10, 1974; *United States* v. *Looney*, 481 F. 2d 31 (C.A. 5), certiorari denied, 414 U.S. 1070; *United States* v. *Briddle*, 436 F. 2d 4 (C.A. 8), certiorari denied, 401 U.S. 921; see also *United States* v. *Broomfield*, 336 F. Supp. 179 (E.D. Mich.). But see *United States* v. *Gamble*, 473 F. 2d 1274 (C.A. 7).

might endanger them, conduct a limited "protective * * * search for weapons." *Id.* at 29. We submit that a similar rule should permit a "quick and cursory viewing of the apartment area for the presence of other persons who might present a security risk." *United States* v. *Briddle*, 436 F. 2d 4, 7 (C.A. 8), certiorari denied, 401 U.S. 921. Such a protective sweep is particularly appropriate where, as here, the agents lawfully within the premises find that at least two men are armed, that one of the armed men raises his weapon in the direction of an agent, that other persons are sitting on a couch and may pose a danger, and that the residence contains other rooms that may also contain confederates, who may also be armed and dangerous.

Although no decision of this Court has expressly recognized that a protective sweep is a reasonable search within the meaning of the Fourth Amendment, *Terry* and several other cases hold that it is reasonable for police to make suitably limited self-protective searches.[13] This Court held in *Warden* v. *Hayden*, 387 U.S. 294, 299, that when a suspect is detained the scope of an attendant search must be "as broad as may reasonably be necessary" to prevent resistance or escape. In determining the scope of this reasonable search, it should not be limiting that the danger of resistance comes from confederates rather than the apprehended suspect; to the contrary, undiscovered

[13] The argument need not rest exclusively on recent developments. At common law in England, and well into the twentieth century in the United States, the power to search the premises of an arrested person was unquestioned. See Taylor, *Two Studies in Constitutional Interpretation* 28 (1969).

confederates, who are able to attack before they are noticed in adjacent rooms, may often be the greatest danger posed to law enforcement officials.

The scope of search incident to lawful arrest was examined in *Chimel* v. *California,* 395 U.S. 752, relied upon by the court below. Although *Chimel* established that the scope of search was limited to the arrestee and the area in his immediate control, the Court had no occasion in that case to consider the standards of reasonable conduct should the police have reason to fear that confederates might be present and undiscovered. Moreover, the nature of the search in *Chimel* (a ransacking of an entire house in a quest for evidence) presented an entirely different question. The ultimate rationale of *Chimel* supports the position of this petition; the Court allowed the search of the person and his vicinity in order to ameliorate the dangers of possible use of a weapon for escape or assault of the arresting officer. *Id.* at 763. These important interests justified a search reasonably limited to a scope sufficient to deal with the problem. With like reasoning, when the danger to the officer, and the threat of facilitating escape, come from the possibility of a confederate, it is reasonable to conduct the minimum search necessary to guard against the danger posed.

> "[W]hen an arrest is made, it is reasonable for a police officer to expect the arrestee to use any weapons he may have * * *."

Cupp v. *Murphy,* 412 U.S. 291, 295. Similarly, it is reasonable for the officer to expect the arrestee's confederate to use weapons, if necessary, to come to the arrestee's aid—particularly if the aid can be rendered

from another room that the officers are forbidden to enter.

It was illogical for the court below to hold that, although it is reasonable to search the arrestee and his vicinity for weapons, the officers cannot equally reasonably make a "quick, spontaneous search for anyone who might cause harm or place the police officers in jeopardy." *United States* v. *Broomfield*, 336 F. Supp. 179, 185 (E.D. Mich.). Indeed, to fail to do so would have been "foolhardy." [14] *Ibid.*

Such a search is an everyday law enforcement practice viewed by police officers (quite reasonably, we submit) as necessary for their protection. So long as it entails no more than a scan for additional persons in other rooms,[15] it is limited to the circumstances that call it forth. It does not require or permit the "general, exploratory rummaging" (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 467) that our Fourth Amendment jurisprudence has found so offensive. The protective sweep is, therefore, under the circumstances of this case, a reasonable search.

The Court should take this opportunity to correct the error below, resolve the conflict among the cir-

[14] Faced with a serious threat to their safety by a possible confederate, it is likely that the officers would make such a protective sweep whether or not its fruits are admissible in evidence. In such pressing situations, it is doubtful that the exclusionary rule could successfully perform a deterrent function. See generally Oaks, *Studying The Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 724–732 (1970).

[15] If contraband is found in plain view during the course of this lawful protective sweep it is, of course, admissible. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465.

cuits, and make it clear that law enforcement officials are entitled to secure their personal safety through use of this limited technique.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

SEPTEMBER 1974.

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APPENDIX A

United States Court of Appeals for the Seventh Circuit

SEPTEMBER TERM, 1973

SEPTEMBER SESSION, 1973

No. 73-1484

UNITED STATES OF AMERICA, APPELLANT

v.

DONALD L. COOKS, APPELLEE

Appeal from the United States District Court for the Eastern District of Illinois

No. 73-CR-32-E

JAMES L. FOREMAN, *Judge.*

ARGUED DECEMBER 4, 1973—DECIDED MARCH 13, 1974

Before SWYGERT, *Chief Judge,* KILEY, *Senior Circuit Judge,* and POOS, *Senior District Judge.**

POOS, *Senior District Judge.* Detectives Lester Anderson and Lawrence Brewer of the East St. Louis

*Senior District Judge Omer Poos of the Southern District of Illinois is sitting by designation.

Police Department, detached to the St. Louis Office for Drug Abuse Law Enforcement, initiated surveillance of a house in accord with a request by the East St. Louis Chief of Police. The residence, located at 741 North 31st Street, East St. Louis, Illinois, was surveilled during the hours of 11:30 a.m. to 9:30 p.m. on the date of January 31, 1973. Throughout this prolonged period the detectives observed several individuals arrive by car and then enter and depart the premises within an abbreviated period of time. On one occasion Anderson and Brewer followed an automobile whose passengers had just made such a visit to the residence in question. The automobile was subsequently stopped, the five passengers therein were frisked, but no incriminating evidence was discovered. Thereafter the officers returned to continue their observation of the house. This surveillance was later augmented by detectives and agents of the St. Louis DALE Office, the East St. Louis Police Department, and the Illinois Bureau of Investigation.

At 9:10 p.m. Detectives Anderson and Brewer, accompanied by two other officers, followed another car whose occupants had just made a brief visit to 741 North 31st Street, East St. Louis, Illinois. After following for some distance the vehicle was stopped for investigatory purposes, there being no evidence or testimony adduced at the hearing indicating a traffic violation or other criminal activity. As one of the passengers alighted from the car Anderson observed an envelope which was found to contain a green vegetable substance resembling marijuana. Upon questioning, the man stated that he had purchased the substance at 741 North 31st Street.

Thereafter Anderson and Brewer returned to the residence ostensibly to make a "buy and bust." They were accompanied by a number of officers to the front

of the house, while other officers encircled and positioned themselves at the rear of the premises. Anderson and Brewer approached the front door and were admitted by an individual later identified as Calvin Cooks. Calvin Cooks was wearing a shoulder holster with the gun in place. Upon entering the detectives noticed one Willie G. Smith who was wearing an empty shoulder holster; Smith appeared to recognize Detective Anderson at which point a scuffle ensued with Anderson relieving Smith of his gun. Contemporaneous therewith three officers entered the front of the premises. One of these officers, James Walker, went throughout the remainder of the house and searched the premises. He proceeded to the kitchen where defendant Donald L. Cooks was seated at a table containing a number of envelopes, some green vegetable material and a .32 calibre pistol. As Walker entered the kitchen and confronted the defendant, Agents Culp and Bloemker of the St. Louis DALE Office entered through the rear door of the house. Donald L. Cooks was arrested, the vegetable material was found to be marijuana.

Defendant, Donald L. Cooks, was subsequently charged in a one count indictment with knowingly and intelligently possessing with intent to distribute approximately 729 grams of marijuana in violation of Title 21 U.S.C. Sec. 841(a)(1). A pre-trial hearing was conducted pursuant to defendant's Motion To Suppress; the District Court Judge ruled that the evidence in question was seized in violation of the Fourth Amendment to the United States Constitution. The United States Government appeals that decision.

It is evident from the above recital of facts that no search warrant was in existence at or prior to the entry of the premises in issue. The most basic principle in regard to the validity of governmental action

of this type is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *U.S.*, 389 U.S. 347, 357. These exceptions are to be "jealously and carefully drawn," and there must be a demonstration by those who seek exemption that the exigencies of the situation made that course imperative. *Jones* v. *U.S.*, 357 U.S. 493, 496; *McDonald* v. *U.S.*, 335 U.S. 451, 456. The burden then is on those seeking exemption to show the need for it, and it is a "heavy" burden that must be met. *U.S.* v. *Jeffers*, 342 U.S. 48, 51; *U.S.* v. *Gamble*, 473 F. 2d 1274, 1276 (1973). As Mr. Justice Frankfurter stated in *Wolf* v. *Colorado*, 338 U.S. 25, 27-28:

> "The security of one's privacy against arbitrary intrusion by the police—which is at the care [*sic*] of the Fourth Amendment—is basis [*sic*] to a free society. It is therefore implicit, 'in the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned. . . ."

Hence the present search and seizure is to be condemned, unless it can be justified in some other way.

The theory put forth by the Government is that the evidence seized falls within the "plain view" doctrine as recognized and applied by the Supreme Court. *Harris* v. *U.S.*, 390 U.S. 234 (1968) and *Ker* v. *California*, 374 U.S. 14 (1963). The primary requisite necessary for the application of the plain view doctrine is that the officer has a right to be where he is

when he observes the evidence in plain view. In the instant case the Government contends that the admittance of Anderson and Brewer on the pretense of a "buy and bust" satisfies this first requirement. *U.S.* v. *Welsch*, 446 F. 2d 220 (10th Cir. 1971). The present factual situation, however, somewhat belies the contention that the purpose was only to purchase evidence of a crime and not to arrest and search the persons and premises involved herein. The officers had first become aware of suspect criminal activity concerning 741 North 31st Street from information gained by the Chief of Police. The house was then surveilled from 11:30 a.m. to 9:30 p.m. during which time the officers gained additional information about the presence of drugs through interrogation of an individual who had just departed the premises. Finally, supplementary manpower from the St. Louis DALE Office, the East St. Louis Police Department, and the Illinois Bureau of Investigation were called in and surrounded the house at the time of the purported "buy and bust". Never did they seek the protection of a warrant, no proper judicial officer was ever alerted to be available for its issuance. In its entirety the above conduct evinces a disregard for the fundamental requirement of a lawful search, a warrant executed on probable cause. As the Court put it in *McDonald* v. *U.S.*, 335 U.S. 451:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade the [*sic*] privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those

> whose job is the detection of crime and the arrest of criminals. . . .
>
> "And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." Id at 455–456.

It is enough to cite *Agnello* v. *U.S.*, 269 U.S. 20, 33 (1925):

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

If the authenticity of the "buy and bust" is assumed, the Government still has not sufficiently met its burden of bringing the instant search within the realm of the plain view doctrine. The rationale of the plain view exception is evident if the two protections served by the Fourth Amendment warrant requirement are examined. First, the interposition of a magistrate is intended to eliminate searches not based on probable cause. The premise being that an intrusion in the nature of a search and seizure is an evil to be avoided, unless justified by a prior determination of necessity. See *McDonald* v. *U.S.*, supra, *Katz* v. *U.S.*, supra. The second objective is that those searches deemed necessary should be as limited as possible; this being accomplished by the admonishment of a "particular description" of the things to be seized. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), recognized that the plain view doctrine satisfied these objectives of the Fourth Amendment. The Court, however, also

noted that inherent limitations that must be imposed on this exception to the warrant requirement:

> "The limits on the doctrine [plain view] are implicit in the statement of its rationale. The first of these is that the plain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure." Id. at 468.

The second limitation imposed on the aforementioned doctrine which was discussed by the *Coolidge* Court is that the discovery of evidence in plain view must be inadvertent.

> "But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is Constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of exigent circumstances." Id. at 469.

In light of what has been said, it is apparent that the plain view exception cannot justify the police seizure of the marijuana in this case. The Government has demonstrated no circumstances other than the plain view of the evidence itself upon which to bottom its warrantless search, nor have they satisfied the requisite limited scope of this doctrine in that the

police searched every room in the house before seizing the incriminating substance.

The second Governmental theory propounded to validate the instant search is that under the circumstances the officers and agents had a right to make a "protective sweep" of the area. Apparently with this argument the Government ceases to characterize police conduct as constituting a "buy and bust", for they do not contend that an individual entering a private residence to purchase goods, albeit contraband, may make a "protective sweep" throughout the entire premises. Although not explicitly argued, it is a fair inference that with the immediate failure of the police to procure the items sought, the subsequent events had the effect of converting their conduct into an arrest with the alleged concommitant right to conduct a protective sweep.

The controlling principles of a search incident to an arrest are set forth in *Chimel* v. *California,* 395 U.S. 752, 762 (1969):

> "When an arrest is made . . . There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs. . . ."

It is readily apparent that the instant factual situation falls well without the proper scope of a search incident to an arrest as explicated in *Chimel,* supra. The Government attempts to obviate this result by setting forth exigent circumstances. The encounter of two men with shoulder holsters and guns coupled with the mere possibility that others might be present in the house are offered as justifying the officers sub-

sequent search of the premises in its entirety. It is sufficient to say that a substantially stronger showing of exigent circumstances was made in *U.S.* v. *Gamble*, 473 F. 2d 1274 (1973), which this Court rejected. In conformity therewith the Government must show considerably more than it has to justify a search beyond *Chimel* limits.

Therefore, the order of the District Court suppressing the evidence as in violation of the Fourth Amendment to the United States Constitution is hereby affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the District Court of the United States
for the Eastern District of Illinois

CRIMINAL NO. 73–32–E

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONALD L. COOKS, DEFENDANT

MEMORANDUM AND ORDER

Foreman, Judge:

Donald L. Cooks has been indicted for knowingly possessing, with intent to distribute, approximately 729 grams of marihuana, in violation of 21 U.S.C. § 841(a)(1). Before the Court is defendant's motion to suppress as evidence a quantity of marihuana allegedly seized in violation of his Fourth Amendment constitutional rights.

The facts are substantially as follows. At about 11:30 a.m. on January 31, 1973, detectives Lester Anderson and Lawrence Brewer, both of the East St. Louis police department, initiated surveillance of a home at 741 North 31st Street in East St. Louis. The detectives had been advised by the Chief of Police and other officers that a number of citizens had called to complain that narcotics were being sold at the house. The detectives remained parked in an automobile about seven houses away until about 1:00 p.m., at which time they left to follow a city vehicle suspected of being unlawfully used. They returned to the surveillance and remained there until 3:30 p.m. During these peri-

ods a number of persons drove up to the address, entered the house, and left after about five minutes.

At about 3:30 p.m. the officers went to the East St. Louis police station where a more elaborate surveillance of the house was arranged. At 7:30 p.m. seven officers returned to the area and took up positions around the house. At 9:10 p.m. Detectives Anderson and Brewer, with two other officers, followed a car whose passenger had left the house after a two-minute visit. They pulled the car aside at 24th and State Street. The passenger got out of his side of the car, and Detective Anderson spotted a vanilla-colored envelope on the seat. He picked up the envelope and found it to contain a green vegetable material which resembled marihauna. The man stated that he had purchased the marihuana at 741 North 31st Street. No arrest was made of this individual.

At 9:30 p.m. Detectives Anderson and Brewer returned to the house and decided to try to purchase some narcotics and to effectuate an arrest. An individual later identified as Calvin Cooks, wearing a shoulder holster with a .38 caliber pistol met the detectives at the door and told them to come in. As the detectives entered, Detective Anderson observed Willie G. Smith seated in a chair with a pistol in his hand. Smith appeared to recognize Detective Anderson as a police officer. At this point Detective Anderson produced his badge and announced that he was a policeman. He then had to physically wrest the gun from Smith. Three of the officers outside entered the house through the front door. Each of the persons in the room was searched. Weapons and narcotics were found on some of these persons.

Detective James Walker went into the kitchen of the home, where he observed the defendant, Donald L. Cooks, seated at a table on which a number of beige

envelopes were lying. Cooks had a pistol in his possession. Detective Walker seized the weapon and opened the rear door of the house. Detectives Culp and Bloemker entered and Detective Bloemker placed the defendant under arrest. The envelopes were found to contain marihuana.

The issue raised by the instant motion is whether these envelopes were taken from the defendant in violation of the Fourth Amendment proscription of unreasonable searches and seizures.

No warrant to search or to arrest was obtained in this case. A warrantless search is presumptively illegal. "Only where the Government sustains a heavy burden of demonstrating that exigent circumstances rendered impossible the securing of a search warrant or conclusively proves that a knowing and voluntary consent to search was obtained may a warrantless search stand and the evidence therein seized be used at the trial of its owner." *United States* v. *Gamble*, No. 72–1397 (7th Cir., Feb. 12, 1973), at page 3. Here the officers had been watching the house all day and had observed a great deal of traffic in and out. They followed one such visitor, stopped his car, and elicited from him a statement that the drugs had been bought at the house. Certainly the officers had probable cause to seek a search warrant of the premises at that time. Such a course of action would have eliminated any doubt as to the validity of the seizure. There has been no argument that exigencies of the situation made an entry into the house imperative at that time. See *McDonald* v. *United States*, 335 U.S. 451 (1948). Given the presumption against the validity of warrantless searches, and the ample opportunity in this case to obtain a search warrant, the seizure in this case must be invalid. The Government argues that entry onto the premises was obtained by consent, that

the search of the home was conducted incident to the arrest of Smith, and that the envelopes were discovered in plain view. However, the Court feels that the failure to obtain a warrant in the first instance taints the subsequent events. Furthermore, the evidence is not at all clear that the search of the other rooms falls within the scope of a search incident to an arrest permitted by *Chimel* v. *California,* 395 U.S. 752 (1969). The arrest and seizure of the defendant was made by officers who entered through the back door of the house, not by those who had effected the arrest of Smith. Certainly police officers who find themselves in a dangerous armed camp atmosphere may take appropriate measures to secure their own safety. But the facts of this case do not support the validity of the seizure of marihuana from this defendant. *United States* v. *Gamble,* supra.

Therefore, defendant's Motion to Suppress is granted.

Dated: March 29, 1973.

JAMES L. FOREMAN,
United States District Judge.

APPENDIX C

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

March 13, 1974

No. 73-1484

UNITED STATES OF AMERICA, APPELLANT

v.

DONALD L. COOKS, APPELLEE

Appeal from the United States District Court for the Eastern District of Illinois

Before Hon. LUTHER M. SWYGERT, *Chief Judge*, Hon. ROGER J. KILEY, *Senior Circuit Judge*, Hon. OMER POOS, *Senior District Judge.**

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

*Senior District Judge Omer Poos of the Southern District of Illinois is sitting by designation.

APPENDIX D

United States Court of Appeals For the Seventh Circuit

No. 73–1484

July 25, 1974. Before Hon. LUTHER M. SWYGERT, Chief Judge; Hon. ROGER J. KILEY, Senior Circuit Judge.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

DONALD L. COOKS, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Eastern District of Illinois, East St. Louis Division (CR 73 32 E)

On consideration of the petition for rehearing en banc filed by counsel for the plaintiff-appellant, no vote for the suggestion for rehearing en banc having been requested by a judge in regular active service,

IT IS ORDERED that said petition for rehearing be, and the same is hereby denied.

U.S. GOVERNMENT PRINTING OFFICE: 1974